10-26-2016

McKinney v. State Respondent's Brief Dckt. 42964

IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDY L. McKINNEY,	)	
	)	
Petitioner-Appellant,	)	DOCKET NO. 42964-2015
	)	Butte County No. CV-2013-38
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE

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STATEMENT OF THE CASE

Nature Of The Case

Randy L. McKinney ("McKinney"), who was originally sentenced to death for first-degree murder, appeals from the district court's summary dismissal of his post-conviction petition that was filed after he was resentenced to fixed life for first-degree murder.

Statement Of The Facts And Course Of Proceedings

The gruesome facts leading to Bob Bishop's murder and McKinney's convictions for first-degree murder (premeditated and felony-murder), conspiracy to commit murder, robbery, and conspiracy to commit robbery are summarized in State v. McKinney (McKinney I), 107 Idaho 180, 182-83, 687 P.2d 570 (1984). Indeed, in reviewing McKinney's death sentence, the Idaho Supreme Court concluded, "In no other case have we seen such a cold-blooded, callous and wanton plan to murder a relative stranger for the sole motive of monetary gain, coupled with the method of killing, *i.e.*, enticement of the victim to a remote area, shots to the body, and then a deliberate and calculating placing of, execution fashion, shots to the back of the victim's head." Id. at 186.

The district court sentenced McKinney to death for first-degree murder, an indeterminate thirty years for conspiracy to commit murder, fixed life for robbery (with a consecutive fifteen-year enhancement for use of a firearm), and an indeterminate thirty years for conspiracy to commit robbery. McKinney v. State (McKinney III), 133 Idaho 695, 698, 992 P.2d 144 (1999). McKinney's convictions and sentences were affirmed by the Idaho Supreme Court. *See* McKinney I, *supra.*

The district court subsequently denied McKinney's first petition for post-conviction relief, which was affirmed by the Idaho Supreme Court. McKinney v. State (McKinney II), 115 Idaho 1125, 772 P.2d 1219 (1989).

McKinney's first successive post-conviction petition was dismissed pursuant to I.C. § 19-2719, including the claim that his non-death sentences for conspiracy to commit murder, robbery, and conspiracy to commit robbery were illegal. McKinney III, 133 Idaho at 698-99. On appeal, McKinney contended "his two conspiracy convictions and robbery conviction were all lesser included offenses of the first degree murder conviction." Id. at 705. "Because McKinney's non-death claims were not brought within the statutory period for UPCPA claims," the Idaho Supreme Court refused to consider them on appeal. Id. The dismissal of his remaining claims was also affirmed. *See* McKinney III, *supra*.

McKinney's next successive post-conviction petition was also dismissed pursuant to I.C. § 19-2719, and affirmed by the Idaho Supreme Court. McKinney v. State (McKinney IV), 143 Idaho 590, 591, 150 P.3d 283 (2006).

While state court proceedings were pending, McKinney filed a federal Petition for Writ of Habeas Corpus. McKinney v. Fisher, 2009 WL 3151106, *5 (D. Idaho 2009). The federal district court rejected McKinney's guilt-phase claims, id. at *7-20, but granted sentencing relief based upon ineffective assistance of counsel at sentencing, id. at *20-28, and ordered the state to "either begin a new capital sentencing proceeding, or impose a lesser sentence for murder in the first degree, within 180 days from the date of judgment," id. at *20; no further relief was granted, including any claims associated with McKinney's non-capital convictions or sentences.

"In lieu of appeals to the Ninth Circuit Court of Appeals," the parties entered into a binding sentencing agreement ("Agreement"), which in relevant part, states:

> a. Pursuant to Idaho Criminal Rule 11(f)(1)(C), the parties stipulate and agree that McKinney shall be sentenced to a term of fixed life without the possibility of parole for the crime of first-degree murder, concurrent with his sentences for conspiracy to commit murder, robbery and conspiracy to commit robbery;
>
> b. The parties agree that pursuant to Idaho Criminal Rule 11(f)(1)(C) this Court shall be bound by the parties joint stipulation that McKinney be sentenced to a term of fixed life without the possibility of parole for the crime of first-degree murder, concurrent with his sentences for conspiracy to commit murder, robbery and conspiracy to commit robbery;
>
> c. The parties agree not to appeal from Judge Winmill's Memorandum Decision and Order and subsequent Judgment, which were entered on September 25, 2009.
>
> * * * *
>
> e. Pursuant to Idaho Criminal Rule 11(f)(1) and *State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994), McKinney specifically waives and gives up his right to appeal the new judgment and sentence imposed by this Court.
>
> f. McKinney specifically relieves this Court from its obligation to notify him of his appellate rights at resentencing under Idaho Criminal Rule 33(a)(3).

(#38527, R., pp.9-8)[1] (verbatim)[2].

The district court followed the Agreement, sentencing McKinney to fixed life without the possibility of parole for first-degree murder to run concurrently with his

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[1] Because the pages in the Clerk's Record in case #38527 are numbered in reverse order, the state will refer to them in reverse order.

[2] On June 29, 2016, the Idaho Supreme Court entered an order taking judicial notice "of the files and records from Appeal Nos. 14551 and 38527.

sentences for conspiracy to commit murder, robbery, and conspiracy to commit robbery. (#38527, R., pp.14-13.)

McKinney subsequently filed a Motion to Correct Illegal Sentence, contending his conviction and sentence for robbery violates double jeopardy because it should have merged with his felony-murder conviction and sentence, and his convictions for murder, robbery, and conspiracy to commit robbery violate double jeopardy and I.C. § 18-301 because they constitute "one continuous act" with his conviction and sentence for conspiracy to commit murder. (#38527, R., pp.27-15.) Therefore, according to McKinney, his "sentences for murder, robbery and conspiracy to commit robbery must be vacated. Defendant's sentence must be reduced to the 'indeterminate life sentence not to exceed 30 years imprisonment' imposed by the trial court for the charge of conspiracy to commit murder." (Id., p.17.) The district court denied McKinney's motion, initially concluding his robbery conviction is not an included offense of his premeditated first-degree murder conviction, and then explaining that determining whether the crimes arose out of the same act or occurrence would require examination of the underlying facts of the crimes, which is not permitted when determining whether a sentence is "illegal" under I.C.R. 35. (Id., pp.47-41.) Because "[n]othing on the face of the record suggests that the sentence is illegal," the court denied McKinney's motion. (Id., p.42.)

The Idaho Supreme Court affirmed the denial of McKinney's motion, initially agreeing that McKinney's robbery conviction is not an included offense of premeditated first-degree murder and, because McKinney was convicted of both felony-murder and premeditated murder, there was no double jeopardy violation. State v. McKinney (McKinney V), 153 Idaho 837, 841, 291 P.3d 1036 (2013). The supreme court also

agreed that McKinney's claim that his sentences for murder, robbery, and conspiracy to commit those crimes violated I.C. § 18-301 was not cognizable in a Rule 35 motion because that question involved "significant questions of fact" that were not "clear from the face of the record." Id. at 842.

McKinney then filed a *pro se* Petition for Post-Conviction Relief. (#42964, R., pp.6-12.) The state filed an answer providing general responses, specific answers, and four affirmative defenses. (Id., pp.42-44.) A Motion to Dismiss was also filed asserting the claims are barred by the statute of limitation under I.C. § 19-4902(a), that McKinney waived his right to appeal and seek post-conviction relief, and, citing Small v. State,132 Idaho 327, 331, 971 P.2d 1151 (Ct. App. 1999), that there was "no evidentiary basis to support [the] claims." (#42964, Supp. R., pp.28-29.) After appointing counsel (#42964, R., p.45), the district court heard argument on the state's Motion to Dismiss (#42964, Tr., pp.4-12), and orally denied relief concluding that McKinney's petition violated I.C. § 19-4908 because it was a successive petition and that McKinney waived his right to appeal from the resentencing (id., p.11). Nevertheless, the court entered Findings of Fact, Conclusions of Law, and Order ("Order") and, after expounding upon the reasons to dismiss the claims, dismissed the entirety of the petition. (#42964, R., pp.52-55.) Judgment was entered December 8, 2014 (id., p.56), and McKinney filed a timely Notice of Appeal (id., pp.57-60).

ISSUE

McKinney has phrased the issue on appeal as follows:

> Whether the district court erred in summarily dismissing most of Mr. McKinney's post-conviction claims? [sic]

(Brief, p.9.)

The state wishes to rephrase the issues on appeal as follows:

Was McKinney given sufficient notice for the dismissal of Claims 2, 3, 4, 6, and 7 prior to the district court summarily dismissing those claims in his post-conviction petition?

ARGUMENT

The State's Motion To Dismiss And The Hearing On That Motion Provided McKinney Sufficient Notice Prior To The District Court Summarily Dismissing Claims 2, 3, 4, 6, And 7

A. Introduction

On appeal, McKinney contends the district court erred by dismissing Claims 2, 3, 4, 6, and 7[3] because he was not provided notice for the reasons of dismissal as required under I.C. § 19-4906(b) and (c), and, alternatively, that the district court erred as a matter of law by dismissing Claim 4. (Brief, pp.10-19.) The record establishes that McKinney was provided sufficient notice of the reasons for dismissal and, even if insufficient notice was provided, because the claims fail as a matter of law, there was no error.

B. Standard Of Review

In State v. Dunlap, 155 Idaho 345, 383, 313 P.3d 1 (2012), the Idaho Supreme Court reaffirmed the standard of review in post-conviction cases when summary dismissal is granted:

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding.

[3] Like McKinney, the state has renumbered the claims from the Petition for Post-Conviction Relief. Although McKinney actually raised eight claims (#42964, R., pp.8-9), the fourth claim, which raised a generic ineffective assistance of counsel claim (id., p.8) was subsumed in his four other ineffective assistance of counsel claims (id., p.9), resulting in a total of seven post-conviction claims.

C. Legal Standards In Post-Conviction Cases And Summary Dismissal

"Generally, the Uniform Post-Conviction Procedure Act (UPCPA), I.C. § 19-4901 to 4911, applies to post-conviction proceedings." Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376 (2004). A petition for post-conviction relief initiates a proceeding that is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548 (1983). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476 (2008). However, a post-conviction petition differs from a complaint in an ordinary civil action because the petition must contain much more than "a short and plain statement of the claim." Dunlap, 141 Idaho at 56. Rather, a post-conviction petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870 (2007) (citing I.C. § 19-4903). In other words, "[t]he application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123 (2008) (citing I.C. § 19–4903). The district court may also take judicial notice of the records, transcripts and exhibits from the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 895 (1988), *overruled on other grounds*, State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992); Matthews v. State, 122 Idaho 801, 808, 839 P.2d 1215 (1992).

Idaho Code § 19-4906(c) provides:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

"Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56." Yakovac, 145 Idaho at 444. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278 (2003). "A 'prima facie case' means the 'production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor.'" Pizzuto v. State, 146 Idaho 720, 728, 202 P.3d 642 (2008) (quoting *Black's Law Dictionary* 1209 (Bryan A. Garner ed., 7th ed., West 1999)). "However, summary dismissal may be appropriate even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's merely conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." Payne, 146 Idaho at 561 (internal quotes and citations omitted). Further, as reaffirmed by the Idaho Supreme Court:

> [W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial court is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Id.

Where petitioner's affidavits or other evidence is based upon hearsay rather than personal knowledge, or is otherwise inadmissible, summary disposition is appropriate. Ivey v. State, 123 Idaho 77, 87-81, 844 P .2d 706 (1993); State v. LePage, 138 Idaho 803, 807, 69 P.3d 1064 (Ct. App. 2003). Summary dismissal is also appropriate if the allegations do not justify relief as a matter of law. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216 (1990).

"A court may grant the motion of either party under I.C. § 19-4906(c), or may dismiss the application *sua sponte* under I.C. § 19-4906(b)." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798 (2007). "[W]here a trial court dismisses a claim based upon grounds other than those offered—by the State's motion for summary dismissal, and accompanying memoranda—the defendant seeking post-conviction relief must be provided with a 20–day notice period." Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277 (2010). If "the dismissal is based upon the grounds offered by the State, additional notice is unnecessary." Id. Where there is "significant overlap between the reasoning in the district court's decision and the State's motion to dismiss," the district court's reliance on additional reasoning not provided by the state does not make dismissal "so different in kind as to transform its decision into a *sua sponte* dismissal" that would require it to give 20 days notice of its intent to dismiss. Workman, 144 Idaho at 524.

D. McKinney Was Provided Sufficient Notice

1. Claim 2

McKinney's second claim reads, in relevant part:

> Whether . . . upon resentencing, and pursuant to the binding plea agreement, the Petitioner was sentenced for "premeditated murder," or was the Petitioner sentenced for "first degree murder" (felony murder),

> and to continue to refer to the sentence and conviction as premeditated murder is not correct and violates due process.

(#42964, R., p.8) (capitalization and punctuation altered).

In its Order, the district court restated Claim 2 and concluded:

> [I]t is a frivolous claim for which relief cannot be granted, nor does the Petitioner allege any specific violation of law, error by the Court or cause of action for which relief can be granted, as noted by the Court, "it defies belief that the State would gratuitously absolve McKinney of serving any sentence whatsoever for premeditated murder." *State v. McKinney*, 153 Idaho 837 (Idaho 2013).

(Id., pp.53-54.)

On appeal, McKinney contends the district court dismissed Claim 2 on different grounds than those previously articulated by the state. (Brief, p.14.) However, McKinney concedes (Brief, p.13) that at the hearing on the state's Motion to Dismiss, the prosecutor stated that the claims in McKinney's petition were "obviously the same issues that were in the original appeals and the original post-conviction petition," and the merger argument "was an issue that has been brought up on appeal in these cases before, and there was no relief that was granted for that issue" (#42964, Tr., p.6, Ls.5-10, p.10, Ls.13-22). The quoted language from the district court's decision is from McKinney V, 153 Idaho at 841 n.7, where the Idaho Supreme Court specifically addressed the question of whether McKinney was sentenced for "felony-murder" or "premeditated murder," with the supreme court ultimately concluding, "it defies belief that the State would gratuitously absolve McKinney of serving any sentence whatsoever for premeditated murder." Therefore, because the prosecutor asserted during the hearing on the Motion to Dismiss that Claim 2 was previously raised and addressed in McKinney V, and the district court dismissed Claim 2, at least in part, based upon that assertion, the notice

provisions of I.C. § 19-4906(c) have not been violated and the district court's decision should be affirmed. *See* Kelly, 149 Idaho at 523 (affirming the summary denial of post-conviction relief where the dismissal of the post-conviction petition "was based at least partially on the grounds that the State argued").

Moreover, in its Motion to Dismiss the state also asserted that, pursuant to the Agreement, McKinney was not entitled to relief because he "waived his right to appeal . . . the disposition of the Court." (#42964, Supp. R., p.28.) Indeed, the Agreement expressly stated, "McKinney specifically waives and gives up his right to appeal the new judgment and sentence imposed by this Court." (#38527, R., p.8.) The district court agreed that, based upon the Agreement, post-conviction relief should be denied with respect to Claim 2 because McKinney waived his right to appeal the new judgment and sentence (#42964, Tr., p.11), which McKinney has not challenged on appeal. Therefore, because the district court's dismissal of Claim 2 was based, at least in part, upon grounds the state argued before the district court, the court's decision should be affirmed.

2. Claim 3

McKinney's third claim reads, in relevant part:

> Whether . . . the sentence imposed (whether or not agreed upon by all parties), is illegal, as there was no provision in the laws, at the time of the commission of the offenses, for the court to impose a "fixed life" sentence (the court lacked subject matter jurisdiction to impose such a term).

(#42964, R., p.8) (capitalization and punctuation altered).

In its Order, the district court addressed Claim 3:

> The Petitioner's claim that the Court did not have authority to enter a sentence of "fixed life sentence" pursuant to the plea agreement jointly

> submitted by the parties has no legal merit. *State v. Wilson*, 107 Idaho 506 (Idaho 1984). I.C § 19-4906(b).

(Id., p.54.)

McKinney contends the district court dismissed Claim 3 on different grounds than those previously articulated by the state. (Brief, p.15.) While it appears the state did not expressly state that Claim 3 should be dismissed because it was without legal merit under State v. Wilson, 107 Idaho 506, 508-09, 690 P.2d 1338 (1984), in its Motion to Dismiss the state did assert there was "no evidentiary basis to support [McKinney's] claims. *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1999)." (#42964, Supp. R., p.29.) At the hearing on the state's Motion to Dismiss, the prosecutor further asserted, "There certainly is no evidentiary basis to support any of those legal claims." (#42965, p.6, Ls.23-24.) In the context of this specific claim, the lack of evidentiary support was sufficient notice to McKinney because no amount of evidentiary support would have salvaged Claim 3 since it fails as a matter of law. As explained in Wilson, 107 Idaho at 508-09, McKinney's claim that the district court could not impose a fixed life sentence for first-degree murder is without merit and fails as a matter of law. *See also* State v. Merrifield, 112 Idaho 365, 366, 732 P.2d 334 (Ct. App. 1987) ("Under *Wilson,* the district court's sentencing options for the underlying crime of first-degree murder were limited to a fixed or indeterminate life sentence."); State v. Nellsch, 110 Idaho 594, 595, 716 P.2d 1366 (Ct. App. 1986) ("If the death penalty is not imposed, then only a life sentence—which may be either fixed or indeterminate—shall be imposed.").

Alternatively, should this Court determine the state's assertion that there was no evidentiary support for Claim 3 constituted insufficient notice, there is no need for remand where a post-conviction claim fails as a matter of law irrespective of the amount

of evidentiary support. The underlying purpose of providing post-conviction petitioners notice of the basis for dismissal is to give the petitioner an opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488 (Ct. App. 1995). Where no amount of additional legal authority or evidence will result in a cognizable claim or a genuine issue of material fact, there is no basis for remand. Therefore, because Claim 3 fails as a matter of law, there is no reason for remand and the district court's decision should be affirmed.

3. Claim 4

McKinney's fourth claim reads, in relevant part:

> Counsel, during the plea negotiations which lead to the binding plea and the re-sentencing in this case, informed me that I would be re-sentenced to first degree murder (felony murder), not premeditated murder.

(#42964, R., p.9) (capitalization and punctuation altered).

In its Order, the district court addressed Claim 4:

> Petitioner's claim of ineffective assistance of counsel for not informing Petitioner of the charge he was sentenced [to] on November 18, 2009[,] fails to allege deficient conduct by his counsel and asserts no facts contrary to the record. The Court's colloquy specifically told Petitioner the charge in which he was being sentenced. Petitioner acknowledged he understood the charge and his wish to proceed. Petitioner's claim also fails to allege how Petitioner has been prejudiced by his allegation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Mitchell v. State*, 132 Idaho 274 (Idaho 1998).

(Id., p.54) (punctuation altered).

McKinney contends the district court dismissed Claim 4 on different grounds than those previously articulated by the state. (Brief, p.16.) However, in its Motion to Dismiss the state expressly stated there was "no evidentiary basis to support his claims. *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1999)." (#42964, Supp. R., p.29.) At the hearing on the state's Motion to Dismiss, the prosecutor reasserted, "There certainly is no evidentiary basis to support any of those legal claims." (#42964, Tr., p.6, Ls.23-24.) The district court's conclusions that McKinney's fourth claim "fails to allege deficient conduct by his counsel and asserts no facts contrary to the record" and that the "claim also fails to allege how [McKinney] has been prejudiced by his allegation" are based upon the state's assertion in its Motion to Dismiss that there was "no evidentiary basis to support his claims." Even though there may have been additional bases adopted by the district court for dismissal of Claim 4, based upon the language from the state's Motion to Dismiss, McKinney has failed to establish he was not provided sufficient notice regarding part of the basis for dismissal of Claim 4. *See* Workman, 144 Idaho at 524. Therefore, the district court's decision should be affirmed.[4]

4. Claim 6

Similar to McKinney's third claim, which raises a substantive claim regarding the legality of a fixed life sentence for first degree murder (#42964, R., p.8), McKinney's sixth claim raises ineffective assistance of counsel, and reads:

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[4] McKinney also contends the district court erred by concluding Claim 4 was waived as part of the Agreement. (Brief, p.16.) To the extent the district court's decision was based upon a waiver of post-conviction rights stemming from the Agreement, the state agrees; the agreement does not contain a waiver of post-conviction rights. However, as explained above, because of the other bases for summary dismissal of Claim 4 that were utilized by the district court, any alleged error stemming from the district court's alleged conclusion that the Agreement included a waiver of post-conviction rights is harmless.

> Counsel for the Petitioner failed to recognize that at the time of the commission of the offenses Idaho law provided for the sentence(s) of death, or life in prisonment [sic] for the crime of first degree murder. There was no sentence possible for a "fixed life term," and as such counsel was ineffective for allowing me to be sentenced at the time I was re-sentenced to a term that the court lacked statutory authority to impose.

(Id., p.9) (capitalization and punctuation altered).

In its Order, the district court addressed Claim 6:

> Petitioner's claim regarding his counsel's alleged deficient performance regarding the sentence of a fixed term of life is without merit, since such an argument is contrary to law. Furthermore, such an argument being contrary to law, the absence of such an argument cannot create prejudice to the Petitioner. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Mitchell v. State*, 132 Idaho 274 (Idaho 1998).

(Id., pp.54-55) (punctuation altered).

On appeal, McKinney contends the district court dismissed Claim 6 on different grounds than those previously articulated by the state. (Brief, p.17.) Although Claim 6 is based upon ineffective assistance of counsel and governed by the dictates of Strickland v. Washington, 466 U.S. 668, 687 (1984), which requires that McKinney establish his attorney's representation was deficient and that the deficiency was prejudicial, the same analysis from Claim 3 applies to this claim. Under Strickland, 466 U.S. at 688, McKinney has the burden of first establishing counsel's performance "fell below an objective standard of reasonableness." Additionally, McKinney has the burden of establishing "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id. at 694, which "requires a substantial, not just conceivable, likelihood of a different result," Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (internal quotations and citation omitted).

In its Motion to Dismiss, the state asserted there was "no evidentiary basis to support [McKinney's] claims." (#42964, Supp. R., p.29.) At the hearing on the state's Motion to Dismiss, the prosecutor reasserted, "There certainly is no evidentiary basis to support any of those legal claims." (#42964, Tr., p.6, Ls.23-24.) As with Claim 3, in the context of this specific claim, the lack of evidentiary support was sufficient notice to McKinney because no amount of evidentiary support would have salvaged Claim 6 since it fails as a matter of law. As explained above, McKinney's assertion that Idaho law prohibited the imposition of a fixed life sentence for first-degree murder is incorrect. Therefore, as a matter of law, the evidence supporting Claim 6 was insufficient because his counsel's performance could not have been deficient since Idaho law expressly permitted a fixed life sentence; nor could McKinney have alleged sufficient facts to establish prejudice. Because McKinney was provided sufficient notice of the basis for the district court's dismissal, his argument fails, and the district court should be affirmed. Alternatively, as discussed above regarding Claim 3, because Claim 6 fails as a matter of law, there is no basis for remand and the district court's decision should be affirmed.

5. Claim 7

McKinney's seventh claim states, "Counsel failed to consult Petitioner about appeal." (#42964, p.9.) In its Order, the district court addressed Claim 7:

> Petitioner's claim regarding his counsel failing to advise him regarding the right to appeal has no basis in fact, and is without merit. The Court specifically addressed this issue on the record with Petitioner on November 18, 2009. Thus, Petitioner has not offered any facts or allegation contrary to the transcript of how this issue could create prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Mitchell v. State*, 132 Idaho 274 (Idaho 1998).

(Id., p.55) (punctuation altered).

McKinney contends the district court dismissed Claim 7 on different grounds than those previously articulated by the state. (Brief, p.19.) However, as recognized by McKinney (Brief, p.18), in its Motion to Dismiss the state expressly stated there was "no evidentiary basis to support [McKinney's] claims" (#42964, Supp. R., p.29), and during the hearing on the state's Motion to Dismiss the prosecutor stated, "There certainly is no evidentiary basis to support any of those legal claims" (#42964, Tr., p.6, Ls.23-24). As conceded by McKinney (Brief, p.19), the district court dismissed Claim 7 because it had "no basis in fact" and McKinney "has not offered any facts or allegations contrary to the transcript of how this issue could create prejudice." (#42964, R., p.55.) Obviously, the district court's decision was based upon McKinney's failure to support Claim 7 with sufficient evidence as alleged by the state in its Motion to Dismiss and at the hearing.

Irrespective, like Claims 3 and 6, McKinney's Claim 7 also fails as a matter of law because he expressly waived his right to appeal in the Agreement:

> Pursuant to Idaho Criminal Rule 11(f)(1) and *State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994), McKinney specifically waives and gives up his right to appeal the new judgment and sentence imposed by this Court.

(#38527, R., p.8.)

As a result of McKinney's waiver of his right to appeal, he was barred from filing an appeal, State v. Murphy, 125 Idaho 456, 872 P.2d 719 (1994), which resulted in him being unable to establish either deficient performance or prejudice even if counsel failed to consult with him about the appeal. Indeed, McKinney was expressly questioned, under oath, during the colloquy at the time of his resentencing regarding his waiver of his appellate rights:

> THE COURT: We talked about appealing the decision from the Federal District Court. That also applies to an appeal on this case. So once sentencing is entered on this particular charge, you're waiving the right to appeal this sentence pursuant to this plea agreement. Do you understand that?
>
> THE DEFENDANT: Yes. I'm comfortable with that.

(#38527, Tr., p.6, Ls.11-21.) McKinney agreed that he "had a full and fair opportunity to review this agreement and discuss that with [his] counsel," that there were no other terms of the agreement that had not been discussed, and that he "participated in this sentence agreement freely and voluntarily." (Id., p.7, Ls.14-25.)

Based upon the agreement, coupled with the colloquy, any claim of ineffective assistance of counsel for failing to consult McKinney about the appeal fails as a matter of law. In other words, like Claims 3 and 6, there are no additional facts or legal authority that would have resulted in a viable claim even if additional or different notice had been provided. Therefore, the district court's decision regarding Claim 7 should be affirmed.

CONCLUSION

The state respectfully requests that the district court's Findings of Fact, Conclusions of Law and Order denying McKinney's post-conviction petition be affirmed.

DATED this 26th day of October, 2016.

/s/
L.LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of October, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit